

NO. 39606-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL GUMATAOTAO PALOMO,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable James Orlando, Judge

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BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
<b>A. SUMMARY OF APPEAL.....</b>	<b>1</b>
<b>B. ASSIGNMENTS OF ERROR.....</b>	<b>2</b>
<b>1. MR. PALOMO’S GUILTY PLEA WAS INVOLUNTARY BECAUSE HE WAS MISADVISED ABOUT THE SENTENCING CONSEQUENCES ON COUNTS I AND II.....</b>	<b>2</b>
<b>2. THE TRIAL COURT DENIED MR. PALOMO DUE PROCESS WHEN IT ACCEPTED HIS INVOLUNTARY GUILTY PLEA. ....</b>	<b>2</b>
<b>3. MR. PALOMO’S SENTENCES ON COUNTS I AND II VIOLATE BOTH THE STATE AND FEDERAL CONSTITUTIONAL PROVISIONS AGAINST EX POST FACTO LAWS.....</b>	<b>2</b>
<b>C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.....</b>	<b>2</b>
<b>1. A GUILTY PLEA IS ONLY VOLUNTARY WHEN IT ADVISES THE ACCUSED OF ALL THE DIRECT CONSEQUENCES OF THE PLEA. WHEN MR. PALOMO PLEADED GUILTY TO TWO COUNTS OF FIRST DEGREE CHILD MOLESTATION, HE WAS NOT ADVISED THAT THE SENTENCING CONSEQUENCES WERE DRAMATICALLY DIFFERENT DEPENDING ON WHEN, DURING THE FIVE YEAR CHARGING PERIOD, THE CHARGED ACTS OCCURRED. IS MR. PALOMO’S GUILTY PLEA VOLUNTARY? .....</b>	<b>3</b>
<b>2. DID THE TRIAL COURT VIOLATE THE STATE AND FEDERAL CONSTITUTION EX POST FACTO CLAUSES BY IMPOSING THE MOST PUNITIVE PENALTY FOR CRIMES</b>	

<b>COMMITTED DURING A PERIOD OF YEARS DURING WHICH THE PENALTY PROVISIONS CHANGED? .....</b>	<b>3</b>
<b>D. STATEMENT OF THE CASE.....</b>	<b>3</b>
<b>E. ARGUMENT .....</b>	<b>7</b>
<b>1. MR. PALOMO IS ENTITLED TO WITHDRAW HIS INVOLUNTARY GUILTY PLEA.....</b>	<b>7</b>
<b>a. As charged, Mr. Palomo faced three different potential sentences on counts I and II. ....</b>	<b>8</b>
<b>b. No one seemed to notice, that Mr. Palomo faced three different sentences depending on when, in the five year charging period, he committed counts I and II.....</b>	<b>12</b>
<b>c. Mr. Palomo is entitled to withdrawal his plea to all charges.. ..</b>	<b>13</b>
<b>2. ALTERNATIVELY, THE COUNT I AND COUNT II SENTENCES MUST BE VACATED BECAUSE THEY ARE MORE PUNITIVE THAN PERMITTED UNDER THE LAW IN EFFECT WHEN THE OFFENSES WERE COMMITTED.....</b>	<b>14</b>
<b>F. CONCLUSION.....</b>	<b>16</b>

## TABLE OF AUTHORITIES

Page

### Cases

<u>Boykin v. Alabama</u> , 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)	9
<u>In re Pers. Restraint of Isadore</u> , 151 Wn.2d 294, 88 P.3d 390 (2004)	9
<u>In re Restraint of Cadwallader</u> , 155 Wn.2d 867, 123 P.3d 456 (2005)	14
<u>State v. Bradley</u> , 165 Wn.2d 934, 205 P.3d 123 (2009)	9, 14
<u>State v. Christen</u> , 116 Wn. App. 827, 67 P.3d 1157 (2003)	12
<u>State v. Codiga</u> , 162 Wn.2d 912, 175 P.3d 1082 (2008)	9, 13
<u>State v. Marshall</u> , 144 Wn.2d 266, 27 P.3d 192 (2001)	8
<u>State v. Mendoza</u> , 157 Wn.2d 582, 141 P.3d 49 (2006)	9
<u>State v. Miller</u> , 110 Wn.2d 528, 756 P.2d 122 (1988)	13
<u>State v. Parker</u> , 132 Wn.2d 182, 937 P.2d 575 (1997)	14, 15
<u>State v. Ross</u> , 129 Wn.2d 279, 916 P.2d 405 (1996)	9
<u>State v. Saas</u> , 118 Wn.2d 37, 820 P.2d 505 (1991)	8
<u>State v. Turley</u> , 149 Wn.2d 395, 69 P.3d 338 (2003)	13
<u>State v. Walsh</u> , 143 Wn.2d 1, 17 P.3d 591 (2001)	9
<u>State v. Weyrich</u> , 163 Wn.2d 554, 182 P.3d 965 (2008)	9
<u>State v. Zhao</u> , 157 Wn.2d 188, 137 P.3d 835 (2006)	8

**Statutes**

Former RCW 9.94A.120..... 11

RCW 9.94A.425 - RCW 9.94A.440 ..... 11

RCW 9.94A.712(3)..... 11

RCW 9.94A.712(5)..... 11

RCW 9.94A.712(6)..... 11

RCW 9.94A.713..... 15

RCW 9.94A.728(2)(d) ..... 15

**Other Authorities**

CrR 4.2(f) .....8

Laws of 2000, Ch. 226, sec. 2..... 11

Laws of 2001 2<sup>nd</sup> Special Session Ch. 12, sec. 312 ..... 11

Laws of 2001 Ch. 10, sec. 2..... 11

Wash. Const., Art I, Sec 23 ..... 14

U.S. Const. art. I, § 9..... 14

**A. SUMMARY OF APPEAL**

After plea negotiations with the Pierce County prosecutor, Appellant Michael Palomo pleaded guilty to the original Information charging six crimes all related to the sexual abuse of his daughter, M.P. The Information and the plea form alleged that counts I and II, first degree child molestation, occurred between June 15, 2000, and June 14, 2005. On his plea form, Mr. Palomo was specifically told that he was facing a determinate sentence of 149-198 months on counts I and II and that he could be facing 36 months to life time community custody.

In reality, a determinate sentence is the correct sentence only for any act Mr. Palomo committed between June 15, 2000, and August 31, 2001. For a first degree child molestation occurring on or after September 1, 2001, Mr. Palomo was facing an indeterminate sentence of life in prison with only the possibility of an early release after serving a minimum term of somewhere between 149-198 months as set by the sentencing court.

When Mr. Palomo pleaded guilty, he was misadvised on the consequences of his plea. He was advised that he was only facing a determinate sentence on counts I and II. Yet, an indeterminate life sentence is what the sentencing court imposed without any reference to any specific acts of molestation committed by Mr. Palomo between June 15, 2000, and June 14, 2005.

Mr. Palomo was not properly advised of the sentencing consequences on counts I and II and his pleas on those two counts are consequently involuntary. Mr. Palomo is entitled to challenge his involuntary pleas for the first time on appeal. Because the plea agreement struck between the prosecutor and Mr. Palomo is indivisible, Mr. Palomo is entitled to withdraw his entire plea. Withdrawal of the entire plea is the remedy Mr. Palomo requests.

**B. ASSIGNMENTS OF ERROR**

1. **MR. PALOMO'S GUILTY PLEA WAS INVOLUNTARY BECAUSE HE WAS MISADVISED ABOUT THE SENTENCING CONSEQUENCES ON COUNTS I AND II.**
2. **THE TRIAL COURT DENIED MR. PALOMO DUE PROCESS WHEN IT ACCEPTED HIS INVOLUNTARY GUILTY PLEA.**
3. **MR. PALOMO'S SENTENCES ON COUNTS I AND II VIOLATE BOTH THE STATE AND FEDERAL CONSTITUTIONAL PROVISIONS AGAINST EX POST FACTO LAWS.**

**C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. **A GUILTY PLEA IS ONLY VOLUNTARY WHEN IT ADVISES THE ACCUSED OF ALL THE DIRECT CONSEQUENCES OF THE PLEA. WHEN MR. PALOMO PLEADED GUILTY TO TWO COUNTS OF FIRST DEGREE CHILD MOLESTATION, HE WAS NOT ADVISED THAT THE SENTENCING CONSEQUENCES WERE DRAMATICALLY DIFFERENT DEPENDING ON WHEN, DURING THE FIVE YEAR CHARGING PERIOD, THE**

**CHARGED ACTS OCCURRED. IS MR. PALOMO'S GUILTY PLEA VOLUNTARY?**

- 2. DID THE TRIAL COURT VIOLATE THE STATE AND FEDERAL CONSTITUTION EX POST FACTO CLAUSES BY IMPOSING THE MOST PUNITIVE PENALTY FOR CRIMES COMMITTED DURING A PERIOD OF YEARS DURING WHICH THE PENALTY PROVISIONS CHANGED?**

**D. STATEMENT OF THE CASE**

Michael Palomo was charged in an original Information with the following six crimes:

Count I - first degree child molestation occurring between June 15, 2000, and June 14, 2005;

Count II - first degree child molestation occurring between June 15, 2000, and June 14, 2005;

Count III – second degree rape of a child occurring between June 15, 2005, and June 14, 2007;

Count IV - second degree rape of a child occurring between June 15, 2005, and June 14, 2007;

Count V – third degree rape of a child occurring on November 6, 2007; and

Count VI – first degree incest occurring between June 15, 2005, and November 6, 2007.

CP 1-3. All of the charged acts were committed against Mr. Palomo's daughter, M.P., born on June 15, 1993. See Supplemental Designation of Clerk's Papers (Declaration for Determination of Probable Cause dated October 13, 2008.)

Mr. Palomo accepted the Pierce County prosecutor's plea offer. The plea offer is recorded in Mr. Palomo's Statement of Defendant on a Plea of Guilty:

(g) The prosecutor will make the following recommendation to the judge:

280 months (minimum) to life. Life community custody. Restitution for victim and child produced from charged crimes; Defendant can argue for less than a 280 month minimum; \$500 CVPA; \$200 costs; \$100 DNA; no contact with minor children or victim; Registration as a sex offender for life; State agrees to forego charging and/or arguing aggravators that would justify an exceptional sentence.

CP 10. On the plea form, it says that Mr. Palomo's standard range on counts I and II is 149-198 months and that he is subject to a community custody range "depending on when 3 years to life." CP 6. On counts III and IV, the plea form correctly specifies that Mr. Palomo's sentence is an indeterminate sentence of 210-280 months to life. CP 6.

There is also pre-printed boilerplate language on the plea form that distinguishes the penalties for sex offenses committed during three different windows of time: (1) offenses committed before July 1, 2000; offenses committed on or after July 1, 2000, but prior to September 1, 2001; and for sex offenses committed on or after September 1, 2001. CP 8. The charges on counts I and II span all three windows, from June 15, 2000, to June 14, 2005.

To establish a factual basis for the plea, Mr. Palomo stipulated to the facts in the statement of probable cause. CP 16. See Supplemental Designation of Clerk's Papers (Declaration for Determination of Probable Cause dated October 13, 2008.) There is only one specific incident identified by a date in the probable cause declaration. That is November 6, 2007, which is the date specifically alleged for count V, the third degree rape of a child. Otherwise, the probable cause statement only refers to dates in a general sense:

“ The defendant told Manglona he started having sex with MP when she was about 10 years old.”

“The detectives spoke to the defendant who reported that he had been sexually touching his daughter, MP. He said it started more than a year earlier and that the last time it occurred was about a year earlier. The defendant said that he remembered having sexual intercourse with her at least twice.”

“The detectives spoke to MP's mother who reported that recently, MP told her the defendant has been having sexual intercourse with her several times a week while she was living with him.<sup>1</sup> MP apparently told her mother the defendant started molesting her when she was about 7-8 years old and she thought the intercourse started when she was about 12 years old.”

During the plea colloquy, no one mentioned to Mr. Palomo there were three different potential sentencing schemes depending on when the two instances charged in counts I and II actually occurred. Mr. Palomo did acknowledge that it was the Indeterminate Sentence Review Board

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<sup>1</sup> There is nothing in the probable cause statement about when MP lived with Mr. Palomo.

that would ultimately be responsible for determining when he got out of prison. RP 7. This was after the court told Mr. Palomo that he was facing a minimum range of 210-280 months to a maximum penalty of life on counts III and IV. RP 6. During the plea, the court did not specify any findings as to count I and II, instead the court just found that the probable cause statement supported that Mr. Palomo had sexual contact with MP who was less than 12 years of age and not married to Mr. Palomo. RP 10.

Mr. Palomo had no objections to the information contained in the pre-sentence investigation. RP 12. The pre-sentence investigation listed Mr. Palomo's standard range as "life with the minimum set between 149 and 198 months." Supplemental Designation of Clerk's Papers (Pre-Sentence Investigation, page 6).

The prosecutor's interpretation of the sentence on counts I and II was inconsistent. At sentencing, the prosecutor had Mr. Palomo sign a Stipulation on Prior Record and Offender Score (Plea of Guilty), that listed the standard range on counts I and II as 149 to 198 months. See Supplemental Designation of Clerk's Papers (Stipulation on Prior Record and Offender Score (Plea of Guilty), page 3). And the prosecutor told the court that Mr. Palomo was subject to a sentence of determinate sentence of 149-198 months on counts I and II. RP 13. Yet, at sentencing, the

prosecutor asked the court to impose an indeterminate sentence with a minimum term of 198 months on counts I and II. RP 13.

Defense counsel at sentencing, mentioned a determinate sentence but only as to counts III and IV. RP 19.

The court set a minimum term of 198 months and a maximum term of life on counts I and II with a life time of community custody. RP 23; CP 26.

Mr. Palomo filed a timely notice of appeal asserting that his plea was involuntary and his counsel ineffective. CP 37-38.

#### **E. ARGUMENT**

##### **1. MR. PALOMO IS ENTITLED TO WITHDRAW HIS INVOLUNTARY GUILTY PLEA.**

When Mr. Palomo entered his guilty plea to six charges, he was misinformed of the prospective sentences on counts I and II. As charged, the first degree child molestation in counts I and II could have occurred any time from June 2000 to June of 2005, a five year window. During those five years, the sentence for first degree child molestation did not remain static. Rather, the sentencing consequences changed dramatically. If the molestation occurred on or before August 31, 2001, Mr. Palomo would be released from prison after he had done his time. If the molestation occurred just one day later, on or after September 1, 2001, Mr.

Palomo would be sentenced to life in prison with only a prospect of ever being released. In his plea form, and during the plea colloquy, Mr. Palomo was assured that his case fell into the former “would be released” determinate category. RP 6; CP 5. But that advice was (apparently) wrong because the trial court sentenced Mr. Palomo to a post-9/01 indeterminate sentence. RP 23; CP 26. And because Mr. Palomo was misadvised about the consequences of his plea, his plea was involuntary and he is entitled to withdraw his guilty plea on all his charges.

**a. As charged, Mr. Palomo faced three different potential sentences on counts I and II.**

A defendant is entitled to withdraw his guilty plea whenever necessary to correct a manifest injustice. State v. Zhao, 157 Wn.2d 188, 197, 137 P.3d 835 (2006) (citing CrR 4.2(f)). A ‘manifest injustice’ is “an injustice that is obvious, directly observable, overt, not obscure.” State v. Saas, 118 Wn.2d 37, 42, 820 P.2d 505 (1991)). “Manifest injustice includes instances where '(1) the plea was not ratified by the defendant; (2) the plea was not voluntary; (3) effective counsel was denied; or (4) the plea agreement was not kept.' ” Zhao, 157 Wn.2d at 197 (quoting State v. Marshall, 144 Wn.2d 266, 281, 27 P.3d 192 (2001)). Because an involuntary plea is an manifest injustice, a defendant is entitled to

challenge an involuntary guilty plea for the first time on appeal. State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001). The burden of showing manifest injustice sufficient to warrant withdrawal of a plea agreement rests with the defendant. State v. Codiga, 162 Wn.2d 912, 929, 175 P.3d 1082 (2008). A guilty plea based on incomplete information may be withdrawn whether or not a particular direct consequence was material to the decision to plead guilty. In re Pers. Restraint of Isadore, 151 Wn.2d 294, 302, 88 P.3d 390 (2004).

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. State v. Weyrich, 163 Wn.2d 554, 556, 182 P.3d 965 (2008); In re Pers. Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004) (citing Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L. Ed. 2d 274 (1969)). If a defendant is misadvised about a direct consequence of his plea, the plea is involuntary. State v. Bradley, 165 Wn.2d 934, 939, 205 P.3d 123 (2009). A direct consequence is one that has a “definite, immediate effect on the range of the defendant’s punishment.” State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). The length of a sentence is a direct consequence of a guilty plea. State v. Mendoza, 157 Wn.2d 582, 590, 141 P.3d 49 (2006).

The standard sentencing ranges for counts I and II on Mr. Palomo’s plea form advised Mr. Palomo that his standard range was only

a determinate range of 149-198 months for each count. The plea form also included a notation that Mr. Palomo's sentence would include 36-48 months of community custody or life time community custody "depending on when." CP 5. The determinate range of 149-198 months plus 36-48 months of community custody would have been the correct standard range had Mr. Palomo only been pleading guilty to committing first degree child molestation between July 1, 2000, and before August 31, 2001. CP 8. But Mr. Palomo was pleading guilty to two counts of child molestation charged with having occurred sometime during a five year window from June 15, 2000, to June 14, 2005. CP 1-2. Based upon the stipulated facts in the probable cause statement, Mr. Palomo could have molested his daughter as early as her seventh birthday on June 15, 2000 ("MP apparently told her mother the defendant started molesting her when she was about 7-8 years old[.]" Supplemental Designation of Clerk's Papers (Declaration for Determination of Probable Cause dated October 13, 2008.) There was also a basis for the court to find that the molestation occurred later in the charging period when Mr. Palomo admitted that "he started having sexual intercourse with MP when she was about ten years old." M.P. turned ten in 2003. (PC statement at 1)

Before September 1, 2001, all sexual offenders were sentenced to a determinate sentence. See. Former RCW 9.94A.120, Laws of 2000, Ch. 226, sec. 2. However, in 2001, the Legislature enacted a new law to provide for additional penalties for certain sex offenses to include child molestation in the first degree. See, Laws of 2001 Ch. 10, sec. 2; Laws of 2001 2<sup>nd</sup> Special Session Ch. 12, sec. 312. Under the new statute, a defendant who commits first degree child molestation on or after September 1, 2001, is required to be sentenced to a maximum term consisting of the statutory maximum sentence for the offense, and a minimum term of confinement. See, RCW 9.94A.712(3). Moreover, the defendant serves any time after release from confinement, up to the expiration of the maximum term, on community custody. See, RCW 9.94A.712(5) and RCW 9.94A.712(6). And a defendant who is determined to have violated a condition of community custody can have his community custody revoked. See, RCW 9.94A.712(6); RCW 9.94A.425 – RCW 9.94A.440.

Had Mr. Palomo molested M.P. within the first two weeks after her seventh birthday, yet a third community custody range would apply to his offense. As noted in the plea form boilerplate, for sex offenses committed prior to July 1, 2000, a defendant would receive three years of community custody or up to the period of earned early release, whichever was longer.

CP 8. MP turned seven on June 15, 2000. The charging period for counts I and II commenced on June 15, 2000. CP 1.

- b. No one seemed to notice, that Mr. Palomo faced three different sentences depending on when, in the five year charging period, he committed counts I and II.**

Mr. Palomo was not advised that he was facing three different sentencing consequences that turned on when the two incidents of child molestation actually occurred. This was a mistake. When there is some question as to the actual standard range during a guilty plea, the best practice is for the trial court to make sure the defendant is aware that there are variables that could impact the sentence. See State v. Christen, 116 Wn. App. 827, 832, 67 P.3d 1157 (2003) (guilty plea voluntary because trial court told defendant that sentence could go up or down depending on criminal history). In Mr. Palomo's case, there is nothing in the record at the plea hearing or the sentencing hearing that suggests anyone – the judge, the prosecutor, the defense attorney, Mr. Palomo - was aware of the three different sentencing options that turned on when the incidents occurred within the five year charging period.

When it comes to the voluntariness of a guilty plea, a defendant should *not* be charged with knowing the *legal* impact of his criminal history on his offender score. Where a criminal history is correct and

complete, but the attorneys miscalculate the resulting offender score, then the defendant should not be burdened with assuming the risk of legal mistake. State v. Miller, 110 Wn.2d 528, 529, 756 P.2d 122 (1988) (plea agreement provided that the defendant could argue an exceptional sentence of less than 20 years, but the prosecutor and defense counsel overlooked statutory provision that required a mandatory minimum sentence of 20 years). The defendant assumes only the risk that new or additional criminal history will be discovered but he does not assume the risk of legal error in calculating the offender score. State v. Codiga, 162 Wn.2d 912, 929, 175 P.3d 1082 (2008). Here the trial court erred when accepting Mr. Palomo's guilty plea and sentencing Mr. Palomo without regard to when the charged incidents actually occurred and, consequently, which penalty actually applied.

**c. Mr. Palomo is entitled to withdrawal his plea to all charges.**

Mr. Palomo is entitled to withdraw the guilty pleas on all of his charges even though he was only misadvised on the sentencing consequences as to counts I and II. This is the remedy available to a defendant where, as part of a "package deal," the defendant was correctly informed of some but not all charges. State v. Turley, 149 Wn.2d 395, 399-401, 69 P.3d 338 (2003). Where pleas to multiple counts or charges

were made at the same time, described in one document, and accepted in a single proceeding, the pleas are indivisible from one another. In re Bradley, 165 Wn.2d 934, 942, 205 P.3d 123 (2009).

**2. ALTERNATIVELY, THE COUNT I AND COUNT II SENTENCES MUST BE VACATED BECAUSE THEY ARE MORE PUNITIVE THAN PERMITTED UNDER THE LAW IN EFFECT WHEN THE OFFENSES WERE COMMITTED.**

Where a sentence exceeds the court's sentencing authority, the error may be raised for the first time on appeal. In re Restraint of Cadwallader, 155 Wn.2d 867, 874, 123 P.3d 456 (2005); State v. Parker, 132 Wn.2d 182, 188-89, 937 P.2d 575 (1997).

If a charging period for an offense overlaps statutory amendments, the sentencing court may only impose the sentence that is least punitive during that period. In other words, unless the state proves that charged conduct occurred after the effective date of a more punitive amendment, the court may not impose the more punitive sentence. Parker, 132 Wn.2d at 191-92.

The ex post facto clauses of the state and federal constitutions prohibit a court from imposing a more punitive sentence than was authorized at the time the offense was committed. U.S. Const. art. I, § 9 ("No bill of attainder or ex post facto law shall be passed."); Wash. Const. art. I, § 23 ("No bill of attainder, ex post facto law, or law impairing the

obligations of contracts shall ever be passed.”); Parker, 132 Wn.2d at 192 n. 14.

The post-9/01 sentencing scheme is clearly more punitive than the prior scheme. A pre-9/01 offender could at least expect to be released from custody at the end of his determinate sentence. Now, however, the Department of Corrections (DOC) has discretion to not grant good time and to not release anyone it decides does not meet its screening criteria, even after the court's minimum term has been served. RCW 9.94A.728(2)(d).

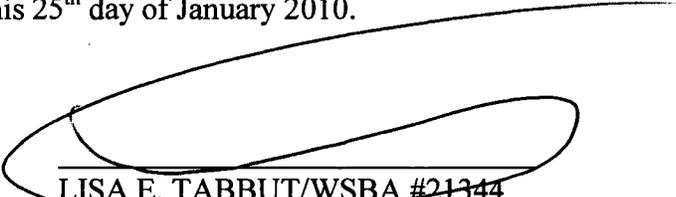
Furthermore, a pre-9/01 offender was under conditions of community custody for 36-48 months, but the post-9/01 offender is subject to those conditions for life. And with that extension comes the extension of DOC's and the Indeterminate Sentence Review Board (ISRB's) authority to impose additional conditions and to revoke release under DOC's and the ISRB's discretion. RCW 9.94A.713.

Given the increased punishment, the state should concede the sentences for counts I and II are barred by ex post facto prohibitions and settled constitutional case law. The indeterminate sentences for counts I and II are both unlawful. The sentences should be vacated and remanded with directions to the sentencing court to resentence Mr. Palomo in accordance with the law in effect at the time of the offenses.

**F. CONCLUSION**

Mr. Palomo's request to withdraw his guilty plea should be granted. Alternatively, his case should be remanded for resentencing on counts I and II.

Respectfully submitted this 25<sup>th</sup> day of January 2010.



LISA E. TABBUT/WSBA #21344  
Attorney for Appellant

CERTIFICATE OF MAILING

State of Washington, Respondent, v. Michael Palomo, Appellant  
Court of Appeals No. 39606-8-II

I certify that I mailed a copy of Appellant's Brief to:

Michael G. Palomo/DOC#330673  
Clallam Bay Corrections Center  
1830 Eagle Crest Way  
Clallam Bay, WA 98326

And that I mailed a copy of Appellant's Brief and a copy of the Supplemental Designation of Clerk's Papers to:

Kathleen Proctor  
Pierce County Prosecuting Attorney's Office  
930 Tacoma Ave. S. Rm. 946  
Tacoma, WA 98402-2171

And that I also mailed the original and one copy of Appellant's Brief and one copy of the Supplemental Designation of Clerk's Papers to the Court of Appeals, Division II.

And that I mailed the original Supplemental Designation of Clerk's Papers to:

Pierce County Superior Court Clerk  
County-City Building  
930 Tacoma Avenue South, Room 110  
Tacoma, WA 98402-2177

All postage prepaid, as required, on January 26, 2010.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT .

Signed at Longview, Washington, on January 26, 2010.



Lisa E. Tabbat, WSBA No. 21344  
Attorney for Appellant

CERTIFICATE OF MAILING